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TONG SENG DIN BON & ANOR.

v.

BAN CHAP AH SENG

HIGH COURT MALAYA, ALOR SETAR

MUSTAPHA HUSSAIN J

b

[CIVIL SUIT NO. 175 OF 1981]

11 FEBRUARY 1987

LAND LAW: *Gift of land - Made out of love and affection - Condition precedent - Whether complied with - Undue influence - Whether gift made voluntarily and out of genuine love and affection - National Land Code - Section 340(2).*

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This was an application by the plaintiffs to set aside a gift of land to the defendant made out of love and affection on the condition that the defendant look after the plaintiffs until their deaths. The plaintiffs contended that the land was transferred without any consideration and that the defendant had failed to keep his promise. To succeed, the plaintiffs must prove that the title which was still held by them is defeasible on the grounds of fraud and misrepresentation.

*d***Held:**

[1] There was no evidence that the plaintiffs had independent advice when the 1st plaintiff made the transfer.

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[2] There was no iota of evidence to show that the plaintiffs had exercised their free and independent will, nor was there evidence of circumstances to support such exercise of free and independent will.

[3] The condition to the said gift, that the defendant looked after the plaintiffs until their deaths, was not carried out by the defendant, except for a few months.

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[4] The defendant had used undue influence to get the 1st plaintiff to transfer the land to him. The Court was satisfied that the defendant had committed a fraud on the 1st plaintiff, a fraud that was very ingenious and subtle.

[5] The plaintiffs had proved their case beyond any reasonable doubt within the ambit of s. 340(2)(a) of the National Land Code.

[Judgment with costs for plaintiffs. Gift set aside.]

*g***Cases referred to:**

Kammallambal v. Armugam Ramaiah 3 MC 40

Inche Noriah v. Shaik Allie bin Omar [1928] 1 MC 79; [1929] AC 127

Allcard v. Skinner [1887] 36 Ch D 145

Errington and Woods [1952] 1 KB 290

Egerton v. Earl Brownlow [1983] 4 HL Cas 1

*h***Legislation referred to:**

National Land Code 1965, ss. 340(2), (2)(a)

For the plaintiffs - S. Visvanathan; M/s. Syarikat Visva

For the defendant - C. Shanmugaiah; M/s. Shanmugaiah & Co.

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JUDGMENT

Mustapha Hussain J:

The 1st plaintiff Tong Seng d/o Din Bon, a Malaysian Thai, at the time of trial was a frail looking 74 year old lady and the 2nd plaintiff, another Malaysian Thai, was her husband who at the time of the trial was 54 years old. When 2nd plaintiff married 1st plaintiff, 1st plaintiff was a widow and 20 years older than him. They were married about 30 years ago. They had no children nor did 1st plaintiff have any children from her previous marriage. Both the plaintiffs were illiterate and the 1st plaintiff was sickly and unwell.

The defendant was also a Malaysian Thai, a young man living near where the 1st and 2nd plaintiffs lived. The defendant used to visit the plaintiffs regularly, especially the ailing 1st plaintiff, helping her in her daily chores and in her rubber land. As both plaintiffs had no children, they came to like the defendant and treated him as their son. This was especially so with the old lady the 1st plaintiff, who actually treated the defendant as her son and as a “son”, the defendant did not fail to behave as such and things were going on well and the three were like a well-knitted happy family. Such was the happy situation that culminated in the old lady the 1st plaintiff, on 20 July 1975 transferring her land lot 6518 SPK 17589 mukim Pulau Baling (an area of 8 r. 037 j.) to the defendant as a gift - “hebah” i.e. without any monetary consideration (see p. 3 of agreed bundle “A”).

On the same day of this “hebah” i.e. 20 July 1975, an agreement was also executed (page 2 of agreed bundle “A”) between the old childless couple and their “son”. In this agreement it was stipulated that the bendang land had been given as a gift and that the defendant could only manage and look after (“berkuasa”) as owner after the death of both plaintiffs.

According to the statement of claim of the plaintiffs, the condition precedent to the gift of the land to the defendant was that the defendant was to look after the plaintiffs until their death.

After this very happy occasion of transferring the land as a gift and the signing of the agreement between the two plaintiffs on the one part and the defendant on the other, the happy relationship started to wane off. The plaintiffs averred that the defendant did look after them but only for about a few months and then stopped. The plaintiffs therefore claimed that the defendant had failed to comply with this condition precedent and as the gift was not an outright gift, the plaintiffs filed this suit to expunge the transfer, to take back the said land.

The defendant on the other hand contended that it was an outright gift made out of love and affection and denied any inducement or any condition precedent to the gift.

The old lady, the 1st plaintiff gave evidence on oath. She testified that she treated and loved the defendant just as if the defendant was her son. Defendant had promised to take care of her until her death. After she was brought to the land office by the defendant, where the transfer was made, she said no one had explained to her in Thai the condition of transfer. 7 or 8 months after the transfer at the Land Office, the defendant stopped looking after her, in spite of her going to defendant’s house to find out whether the defendant was going to continue looking after her. Under severe cross-examination, this frail old lady maintained that she would gladly part with her property, even at the trial, if the defendant would continue to look after her for the rest of her life.

a Up to today, the 1st plaintiff is having the title deed in her possession and is working on the land with whatever little strength she has.

The 2nd plaintiff also gave evidence, which corroborated with that of the 1st plaintiff. Both he and the 1st plaintiff had treated the defendant as their son. Defendant had promised to look after them and take care of them until their death and it was only on this promise and this promise alone that his wife the 1st plaintiff had agreed to give the land as a gift to the defendant. Defendant had broken this solemn promise, i.e. the condition precedent and they therefore wanted to take back the land. As regards the agreement, the defendant was not to “kuasa” the land until their death.

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The former asst. controller of Land Revenue, Baling, (DW1) gave evidence on behalf of the defence. This witness could not remember exactly what happened about ten years ago when the transfer was effected. Nevertheless, he said in all transfers the general practice was that he would first of all ascertain whether the transfer was by way of gift or otherwise and the consideration and he would read out the contents of any agreement. However, he did not know the circumstances or what transpired between the parties in this case. He could only testify as to what he had done in general as asst. CLR.

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The defendant (DW2) gave evidence. He said that he was helping the plaintiffs on the land and as 1st plaintiff was satisfied with his help, she gave him the land. In fact the defendant said it was the 1st plaintiff the old lady, who took him to the District Office, Baling, and gave the land to him. Both the plaintiffs did not object to this gift. After the transfer of the gift, defendant said 1st plaintiff (that old lady again) wanted to make an agreement as a protection from other persons taking away the land.

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Defendant said he continued looking after the 1st plaintiff until the filing of this suit by the plaintiffs. 1st plaintiff had stopped defendant from going to her house. Defendant said he never influenced the old lady to give him that gift of the land.

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Defendant in cross-examination said it was the 1st plaintiff who arranged for the agreement and not him, but he admitted paying the charges for the agreement. Defendant admitted that he knew how to read and write Rumi while both the plaintiffs could not. Defendant was asked why after he became the direct owner of the land upon the transfer, the 1st plaintiff had continued to keep the title deed and to this the defendant replied that the 1st plaintiff wanted to keep it. Defendant agreed in cross- examination that before the transfer of the gift to him, 1st plaintiff had informed him that 2nd plaintiff shall continue to enjoy the benefits of the said land until 2nd plaintiff died, in the event of 1st plaintiff pre-deceasing the 2nd plaintiff. This was before the transfer but he did not tell all these conditions to the Asst. Controller of Land Revenue.

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Defendant also paid for the transfer and registration fees. Defendant had also taken the 1st plaintiff to hospital for about ten times as she was sickly and both the plaintiffs always listened to his advice; all this before the land was given away as a gift. Defendant had his own land of about 4 relongs.

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Under cross-examination again the defendant maintained that it was the 1st plaintiff who had informed the asst. Controller of Land Revenue that the transfer was for love and affection. On being confronted that the asst. CLR had testified that it was not for love and affection, the defendant answered this question by saying “I have nothing to say”.

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To defeat the indefeasibility of title under s. 340(2) of the National Land Code 1965, the plaintiffs must prove fraud or misrepresentation. In this case, the onus is on the plaintiffs to prove undue influence perpetrated by the defendant on the 1st plaintiff induced 1st plaintiff to part with her land as a gift. This is a question of fact for the Court to decide after hearing the testimony of parties in Court.

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One thing is very clear, the 1st plaintiff and the 2nd plaintiff are very old and illiterate. They have no children of their own. They had treated the defendant as a son. The 1st plaintiff as well as the 2nd plaintiff can only speak Thai. As far as the 1st plaintiff is concerned, she is a sickly woman and was so at the material time. She could not by any stretch of imagination take the defendant (who is young and literate) to the district office to tell the asst. CLR that she was going to give her land as a gift to the defendant and after that take the defendant to the petition writer to prepare an agreement. Strangely, it was the defendant who paid for all the fees. Would she know the mechanics of transfers of lands in the land office? Would she also know to take the defendant to the petition writer to prepare an agreement?

*b**c*

Very strangely after admitting in cross-examination that it was agreed in the house before going to the district office that both plaintiffs shall continue to enjoy the benefits of the land even after the transfer, there was no explanation why didn't the defendant not tell the asst. CLR about this condition precedent to the transfer. Defendant maintained that it was the 1st plaintiff who had informed the asst. CLR of this condition. And when confronted by Counsel for plaintiffs that the asst. CLR (defendant's witness) had not said so, but merely said "hebah" and not for natural love and affection, the defendant had nothing to say in reply. There is nothing more clearer of showing that the defendant was not telling the truth. In fact he was shifty and a very cunning one at that.

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Any one listening to the testimony of the witnesses in this case will irresistibly come to the conclusion, as indeed had this Court, that the defendant had cleverly gone out of his way play-acting to help the old plaintiffs, manoeuvring himself into the position of a loving and helpful son, winning the love and earning the trust of the old lady (the 1st plaintiff). He promised her that he will look after her until her death and also to look after her husband (the 2nd plaintiff) until he also died and finally brought her to the land office and had the land transferred into his name as a gift. And very cleverly (more cunningly than cleverly) the defendant, to allay any fear on the part of the plaintiffs, had taken them to make an agreement, assuring that old illiterate couple that they had nothing to fear and that the profits of the land will be theirs until their death, and even allowing the 1st plaintiff to keep the title deed of the land with her till today.

*e**f*

Very naturally, after the transfer the defendant had to maintain this charade and continued to look after the old couple for some time, otherwise it would be too soon for the true colours to appear and suspicion will be aroused.

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The said land was already transferred to the defendant and he had become the registered owner. Why should he arrange with the old lady to keep the title deed still with her? If not to allay any fear then what?

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It is clear from the evidence that the defendant was in a position of active confidence of the 1st plaintiff. It is also very clear that the defendant had fully won over the love and trust of both the plaintiffs to such an extent that he was treated like their son, and that this undue influence was subtly exerted by the defendant, which resulted in the old lady the 1st plaintiff to transfer her land to the defendant.

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- a* More than clear, the defendant had manoeuvred into this filial relationship by going out of his way pretending to help the 1st plaintiff not only in the workings of the padi and rubber lands to such a degree as to be taken as a son into the confidence of the childless couple but also giving them advice. The aidings and helps rendered were all pretences with an ulterior motive and after the gift, these guises and pretences, like all fake things in this world, dissipated and overt themselves to bare the naked truth. And the truth was bare open a few months after the transfer when the defendant knowing the land was already in his name, stopped looking after the old couple. And the defendant's true colours were then seen clearly with all the spots and stripes.
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- c* On top of these, the defendant in his evidence, clearly demonstrated the whole nefarious but clever scheme and never at all did the defendant establish that the gift was made voluntarily and out of genuine love and affection and without undue influence. Nowhere in the evidence of the defendant in rebuttal can the Court find that the old lady the 1st plaintiff when transferring the so called gift had done so without this undue influence acting on her frail mind (see *Kammallambal v. Arumgam Ramiah* 3 MC 40). There is also no evidence that the aged and illiterate 1st plaintiff with her illiterate and aged husband, had independent advice when she made the transfer (see *Inche Noraih v. Shaik Allie bin Omar* [1928] 1 MC 79; [1929] AC 127).
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- Going through the whole evidence, there is no iota of evidence to show the old lady with her old husband, had indeed exercised the free will and independent will, nor is there evidence of circumstances to support such exercise of free and independent will (see *Allcard v. Skinner* [1887] 36 Ch D 145).

- e* There was again this promise by the defendant to look after the two plaintiffs until their death, and in the meantime the profits from the land to be continued to be enjoyed by the plaintiffs. This is a condition to the said gift, which condition was not carried out by the defendant, except for a few months. There is nothing impossible to carry out the condition that he had promised or on which promise *inter alia*, the 1st plaintiff was led down the garden path to the slaughter house i.e. to the Land Office (see *Errington and Woods* [1952] 1 KB 290 and *Egerton v. Earl Brownlow* [1983] 4 HL Cas 1).
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- Considering the evidence as a whole, the Court was satisfied that the defendant had committed a fraud on the 1st plaintiff, a fraud that was very ingenious and subtle.

- The Court found that the plaintiffs had proved their case and done this beyond any reasonable doubt within the ambit of s. 340(2)(a) of the National Land Code 1965. The gift should therefore be set aside.
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- I therefore gave judgment for the plaintiffs in terms of their prayers with costs.

Also found at [1987] 2 CLJ 269

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